90-1724

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

CLYDE L. WEILER,

Petitioner,

vs.

THE STATE OF MISSOURI,

Respondent.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE STATE OF MISSOURI'S RAPE SHIELD STATUTE IS FACIALLY UNCONSTITUTIONAL AS INTERPRETED BY THE MISSOURI SUPREME COURT, OR, ALTERNATIVELY, IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

LIST OF PARTIES

The Petitioner is Clyde L. Weiler.

The Respondent is the State of Missouri.

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CONSTITUTIONAL, STATUTORY AND REGULATORY AUTHORITIES

The sixth amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor . . .

The State of Missouri's applicable rape shield statute, Mo. Rev. Stat. § 491.015 (1986), reads in relevant part as follows:

> 1. In prosecutions under chapter 566, RSMo [sexual offenses], or prosecutions related to sexual conduct under chapter 568, RSMo [offenses against the family], opinion and reputation evidence of the complaining witnesses' prior sexual conduct is inadmissible; evidence of specific instances of the complaining witnesses' prior sexual conduct or the absence of such instances or conduct is inadmissible, except where such specific instances are:
>
> (1) Evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to the alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime; or
>
> (2) Evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease;
>
> (3) Evidence of immediate surrounding circumstances of the alleged crime; or

(4) Evidence relating to the previous chastity of the complaining witness in the cases, where, by statute, previously chaste character is required to be proven by the prosecution.

2. Evidence of the sexual conduct of the complaining witness offered under this section is admissible to the extent that the court finds the evidence relevant to a material fact or issue.

PRIOR OPINIONS IN THIS CASE

The Judgment and Order of the Circuit Court of Jackson County, Missouri in this matter is unreported, but appears in full in the Appendix at 10a.

The opinion of the Missouri Court of Appeals for the Western District is reported at 801 S.W.2d 417 (Mo.App. 1991), and appears in full in the Appendix at 3a. The Order of the Missouri Court of Appeals, Western District, on Application for Rehearing and/or Transfer in this matter is unreported, but appears in the Appendix at 2a.

The Order of the Supreme Court of Missouri on Motion to Transfer in this matter is unreported, but appears in the Appendix at 1a.

JURISDICTIONAL STATEMENT

The opinion of the Missouri Court of Appeals, Western District, was entered on November 20, 1990, affirming the judgment of the Circuit Court of Jackson County, Missouri, entered on August 23, 1989. The Missouri Court

of Appeals, Western District, thereafter denied a timely filed Motion for Rehearing and/or Transfer on January 2, 1991. The Supreme Court of Missouri denied a timely Application for Transfer on February 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

On July 11, 1988, the State of Missouri charged Petitioner in a six-count information with four counts of sodomy, in violation of Mo. Rev. Stat. § 566.060 (1986) and two counts of sexual abuse, in violation of Mo. Rev. Stat. § 566.100 (1986). After trial by jury, which began on June 27, 1989, Petitioner was found guilty of one count of sodomy and two counts of sexual abuse. After overruling Petitioner's timely filed Motion for Judgment of Acquittal After Discharge of Jury, or, In The Alternative, Motion for New Trial, the Circuit Court of Jackson County, Missouri sentenced Petitioner to a term of five years on each count, to be served consecutively.

Petitioner preserved the issue of violations of his right to confrontation pursuant to the sixth amendment to the United States Constitution in pretrial motions and at the pretrial hearing. Petitioner renewed his objection throughout the trial, in his Motion for New Trial, or in the Alternative, Judgment of Acquittal, and in subsequent proceedings at all appellate levels. In each instance, Petitioner's request to present such evidence or his objections were overruled. (See Appendix.)

Petitioner timely filed a notice of appeal in the Missouri Court of Appeals, Western District. On November 20, 1990, the Missouri Court of Appeals filed an opinion affirming the trial court's judgment and sentence. Thereafter, on January 2, 1991, the Court of Appeals denied Petitioner's timely filed Motion for Rehearing and/or Transfer to the Missouri Supreme Court. On February 7, 1991, the Supreme Court of the State of Missouri denied Petitioner's timely filed Application for Transfer. This appeal follows and jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

FACTUAL BACKGROUND

In May of 1988, two minor girls told a school counselor that a young girl, E. B., then ten years old, had been sexually abused. The girls named the then 73-year-old Petitioner as the assailant. Based on those accusations, school authorities contacted both the Kansas City, Missouri Police Department and the Missouri Department of Social Services, Division of Family Services.

During the ensuing investigation, police interviewed and took statements from the minor children. The police then requested Petitioner to come to the local police station for questioning. After being advised of his *Miranda* rights and signing a waiver form, Petitioner provided a statement to the police. In the statement, Petitioner did not admit culpability, and, rather, attempted to explain to police the sexual proclivity of E. B. This statement was ultimately admitted into evidence at the Petitioner's trial, with portions relating to E. B.'s sexual proclivity redacted. Following completion of the

investigation, Petitioner was charged with four counts of sodomy and two counts of sexual abuse.

Petitioner entered a plea of not guilty, asserting that the allegations were fabricated. Prior to trial, Petitioner filed a motion pursuant to Mo. Rev. Stat. § 491.015.3, Missouri's Rape Shield Statute, to offer potential evidence regarding the prior sexual conduct of the alleged victim. The evidence Petitioner sought to introduce included testimony from one minor girl that E. B. had expressed that being around little boys made her "horny," and that E. B. had often masturbated in front of her. E. B. had, herself, admitted that she frequently masturbated. Petitioner made an offer of proof to seek to introduce at trial a Missouri Division of Family Services report on the alleged victim, which stated:

> [E. B.] has some severe emotional problems as she has been sexually acting out with her brother, Robbie, and with a five-year-old neighbor child who she was attempting to perform oral sex on.

Petitioner asserted that this evidence was essential to his defense of bias and fabrication; that such evidence was relevant to show that the prosecutrix had a sexual expertise not derived from any association with him, and that such sexual expertise afforded E. B. the experience to fabricate the charges against him.

The trial court held a pretrial hearing at which time the parties gave oral arguments on Petitioner's motion pursuant to Mo. Rev. Stat. § 491.015.3 to offer potential evidence of sexual conduct. The trial court preliminarily overruled Petitioner's motion, holding that such conduct was not relevant to the issues in the case.

The evidence adduced at trial demonstrated that Petitioner had known E. B.'s mother for a long period of time, and had known other members of her family for more than ten years. The Petitioner assisted the family in buying groceries and providing transportation for E. B.'s mother and grandmother to various places, including their places of employment. The alleged victim, E. B., had experienced an unstable childhood, including molestation by her father. E. B. had been placed in foster care on numerous occasions, and had undergone counseling with the Kansas City Metropolitan Organization to Combat Sexual Assault (MOCSA).

The alleged victim testified at trial, claiming that on various occasions she touched the Petitioner's penis with her hand, mouth, and whole body. She further testified that Petitioner had touched her breasts and vagina with his hand, mouth and tongue. The two minor girls who had reported E. B.'s alleged sexual abuse also testified at trial, relating events which suggested Petitioner's culpability.

The Petitioner testified in his own behalf, generally denying E. B.'s claims of sexual abuse as fabrication and asserting that on numerous occasions she had attempted to initiate sexual relations with him, that he had rebuffed these advances, scolded her for her conduct, and had told her mother about her persistent and improper conduct.

Throughout the trial, the state's prosecutor, through suggestion and innuendo, attempted to portray E. B. as an innocent victim, and argued that the Petitioner's contention that E. B. was the sexual aggressor was wholly

unbelievable. Thus, the evidence excluded from admission by the trial court was relevant to Petitioner's defense of fabrication, and that the alleged victim had the sexual background to create such a charge.

On appeal, the Missouri Court of Appeals, Western District, affirmed Petitioner's conviction, holding that the exclusion under the rape shield statute of the evidence of E. B.'s sexual practices and proclivities was entirely correct and did not violate Petitioner's right to confrontation under the sixth amendment to the United States Constitution or Petitioner's right to a fair trial as guaranteed through the due process clause of the fourteenth amendment of the United States Constitution.

ARGUMENT

MISSOURI'S RAPE SHIELD STATUTE IS FACIALLY UNCONSTITUTIONAL AS INTERPRETED BY THE MISSOURI SUPREME COURT, OR, ALTERNATIVELY, IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

The sixth amendment to the United States Constitution guarantees a defendant a fair trial by providing him with the right to cross-examine all witnesses against him. The sixth amendment, in relevant part, states:

> ARTICLE VI. In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . .

As this Court has held, the right of confrontation is more than a rule of trial procedure; it is a right implicit in the

Constitution. Such right to confrontation ensures the accuracy of the truth-finding process by revealing the prejudices, biases, and ulterior motives of witnesses. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Davis v. Alaska*, 415 U.S. 308, 316 (1974). This right is applicable to the states under the due process clause of the fourteenth amendment to the United States Constitution.

Within the past twenty years, all fifty states have enacted, either through statute, evidentiary rules, or judicial opinion, laws designed to protect rape complainants from public disclosure of prior sexual conduct or reputation. These enactments, typically called "rape shield laws," have been implemented to overcome or abrogate common law evidentiary rules which permitted questioning of complainants concerning their prior sexual activities or unchastity without regard to the relevancy or probative value of such questions in a particular case. *See*, Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763 (1986); Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. Crim. L. & Criminology, 644 (1987).

The rape shield laws throughout the nation can be roughly divided into four categories: (i) a general prohibition of any evidence of the complainant's prior sexual conduct subject to designated exceptions; (ii) a judicial practice which does not recognize any substantive evidentiary exclusions but ensures in camera review and determination by the court as to the probative value versus any prejudicial effect upon complainant; (iii) a

general rule excluding a complainant's past sexual conduct subject to numerous exceptions and a catch-all provision to allow such evidence if determined necessary following *in camera* review, to ensure a fair trial; and (iv) an approach which allows evidence relating to credibility and which disallows evidence relating to consent. *See* Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 Ohio St. L.J. 1245 (1989); *see also* Galvin, *supra*, at 812-894.

The State of Missouri's applicable rape shield statute, Mo. Rev. Stat. § 491.015 (1986), reads in relevant part as follows:

> 1. In prosecutions under chapter 566, RSMo [sexual offenses], or prosecutions related to sexual conduct under chapter 568, RSMo [offenses against the family], opinion and reputation evidence of the complaining witnesses' prior sexual conduct is inadmissible; evidence of specific instances of the complaining witnesses' prior sexual conduct or the absence of such instances or conduct is inadmissible, except where such specific instances are:
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> (1) Evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to the alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime; or
>
> (2) Evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease;
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> (3) Evidence of immediate surrounding circumstances of the alleged crime; or

(4) Evidence relating to the previous chastity of the complaining witness in the cases, where, by statute, previously chaste character is required to be proven by the prosecution.

2. Evidence of the sexual conduct of the complaining witness offered under this section is admissible to the extent that the court finds the evidence relevant to a material fact or issue.

The constitutionality of the rape shield law was first upheld by the Missouri Supreme Court in *State v. Brown*, 636 S.W.2d 929, 934-35 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1212 (1983). In *Brown*, the Missouri Supreme Court permitted certain flexibility in the rape shield law by construing § 491.015.2 as a "catch-all" provision. *State v. Brown*, 636 S.W.2d at 934-35. Under that construction, a trial court could admit any evidence that it found relevant to a material fact or issue, whether or not it was within one of the specific exceptions listed in § 491.015.1(1)-(4). *Id.; See also, State v. Foulk*, 725 S.W.2d 56, 60 (Mo.Ct.App. 1987).

Subsequently, in *State v. Jones*, 716 S.W.2d 799, 800 (Mo. 1986) (en banc), the Missouri Supreme Court drastically modified *Brown* and eliminated any flexibility in the rape shield law. In *Jones*, 716 S.W.2d at 800, the Missouri Supreme Court held that evidence of specific instances of a rape victim's prior sexual conduct is admissible *only* when it falls within the specific exceptions contained in § 491.015.1(1)-(4) *and then* only to the extent that the trial court finds it relevant to a material fact or issue under § 491.015.2. In effect, *Jones* prohibits a defendant from introducing any evidence of a rape victim's

prior sexual conduct unless it fits squarely within one of the specific exceptions contained in the statute, regardless of its relevancy to a material fact or issue or any other factors. The dissent in *Jones* recognized that there are situations where evidence should be admitted even though it does not fall within any specific exception under the rape shield law. *Jones*, 716 S.W.2d at 802 (Blackmar, J., dissenting). For example, Judge Blackmar postulated that when a defendant claims that his accuser was a prostitute who made a charge of rape only after services had been furnished, and there was an argument about consideration, the defendant should be allowed to show that the complaining witness was a professional prostitute. Furthermore, when the defendant asserts that the accuser was a nymphomaniac who threw herself at the defendant, and subsequently got into a disagreement with the defendant, or even because he refused her, she made charges of rape, he should be able to corroborate his claim that she regularly made advances to men. *Id.* at 802-803. Thus, the dissent in *Jones* concluded that by rejecting *Brown* and not allowing the admission of prior sexual conduct unless it fits within one of the enumerated exceptions, the court was inviting constitutional problems. *Id.* at 803. Indeed, the Missouri Supreme Court's decision in *Jones* has left the lower courts on constitutional quicksand.

In *State v. Foulk*, 725 S.W.2d 56, 61 (Mo.Ct.App. 1987), the Missouri Court of Appeals, Eastern District, relied on *Jones* to hold that evidence of prior sexual conduct that is relevant to a material fact or issue raised by the defense is not admissible under the rape shield law unless it falls within an exception contained in § 491.015.1(1)-(4).

In *State v. Douglas*, 797 S.W.2d 532, 535 (Mo.Ct.App. 1990), the Missouri Court of Appeals, Western District, relied on *Jones* to hold that the rape shield law does not absolutely prohibit evidence of prior sexual conduct even if it does not fall within one of the exceptions set forth in § 491.015.1(1)-(4). Such an interpretation of the rape shield law, the court said, would be unconstitutional because the law might then be applied to deprive a defendant of his constitutional rights. *Douglas*, 797 S.W.2d at 535.

The split in Missouri's lower courts over the interpretation of *Jones* and the application of the rape shield law illustrates *Jones'* lack of constitutional foundation. Because *Jones* absolutely prohibits the introduction of evidence of prior sexual conduct unless it falls within one of the four exceptions to the statute, regardless of its relevancy to a material fact or issue, it denies defendants their right to effectively cross-examine and confront the key prosecution witness and to place before the jury for its consideration any potential bias, any motive to testify falsely, or any other relevant matters, in violation of the confrontation clause of the sixth amendment to the United States Constitution. Therefore, Petitioner asserts that the Missouri rape shield law, as interpreted by the Missouri Supreme Court, is facially unconstitutional.

A defendant's right to confront and cross-examine the witnesses against him are fundamental rights, secured by the sixth amendment to the United States Constitution, which was made applicable to the states by the fourteenth amendment to the United States Constitution. *Pointer v. Texas*, 380 U.S. 400 (1965).

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the defendant was prevented by a state evidentiary rule, known as the voucher rule, from presenting certain witnesses who would have testified that another person admitted or confessed to the same crime with which the defendant was charged. Also, the defendant was prohibited from calling as a witness the other person who had, in fact, confessed to the crime. The Court in *Chambers* concluded that the testimony was critical to the defendant's defense and that in those circumstances, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302.

In *Chambers*, this Court recognized that there was an important state interest at stake in the application of the rules of evidence. Additionally, the Court noted that, as a general rule, rules of evidence such as the hearsay rule, are respected and frequently applied in jury trials. *Id.* at 302. Nevertheless, the Court held that such interests must give way when they are inconsistent with the defendant's fundamental rights guaranteed by the sixth amendment to the United States Constitution.

In *Davis v. Alaska*, 415 U.S. 308 (1974), the defendant was prohibited from cross-examining a juvenile witness pursuant to a state statute which prohibited evidence of a juvenile's prior record, even for the purposes of cross-examination and impeachment. Defendant attempted to get this information before the jury since it was relevant to show bias and prejudice. The defendant had attempted to present a defense that the juvenile witness had a

motive to implicate the defendant and divert police attention from himself, since he was a potential prime suspect.

The purpose behind the "juvenile shield law" was to protect the good character and reputation of a juvenile, and to avoid embarrassment. However, the Court in *Davis* found that a witness' lack of credibility is often established by means of cross-examination directed toward revealing possible biases, prejudice, or ulterior motives. *Davis*, 415 U.S. at 316.

The Court noted that the state's aim in protecting the anonymity of juvenile offenders was admirable and important, but it concluded:

> The right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green [the juvenile] or his family by disclosure of his juvenile record – if the prosecution insisted on using him to make its case – is outweighed by the petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness . . . The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the state cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records.

Davis, 415 U.S. at 319-20.

The holdings in *Davis* and *Chambers* clearly demonstrate that a rule of evidence, whether it has its origin in statute, as in *Davis* and the instant case, or in common law, as in *Chambers*, may not be narrowly or mechanistically applied to deprive a defendant of his rights to confront and cross-examine witnesses as guaranteed under the sixth amendment to the United States Constitution.

Because the Missouri Supreme Court has interpreted the rape shield law as an absolute prohibition on the introduction of evidence of prior sexual conduct, unless the evidence expressly falls within one of the four stated exceptions to that law, the statute on its face violates the right to confront and cross-examine witnesses as guaranteed under the sixth amendment to the United States Constitution.

Alternatively, Petitioner argues that, if Missouri's rape shield law, as interpreted by the Missouri Supreme Court, is facially constitutional, then the application of that law in this case violates the sixth amendment to the United States Constitution.

In the trial of this case, Petitioner attempted to present evidence that his alleged victim, E. B., had extensive, prior experience with certain sexual practices in order to establish his defense that she had sufficient prior knowledge to fabricate and did fabricate the evidence against him. For example, Petitioner sought to introduce a Missouri Division of Family Services report on E. B., which stated, "[E. B.] has some severe emotional problems as she has been seen sexually acting out with her brother, Robbie, and with a five-year-old neighbor child who she

was attempting to perform oral sex on." In addition, an offer of proof was made where a school mate testified that E. B. had masturbated quite a number of times in front of her, and E. B. would ask her if being around boys made her "horny." Finally, Petitioner attempted to cross-examine E. B. concerning the fact that she was constantly involved in sexual activities, especially frequent masturbation. At trial, the prosecution introduced Petitioner's statement to the police, but excluded portions relating to the sexual proclivity of E. B.

Additionally, Petitioner testified at trial and in his statement to the police that E. B. had made sexual advances to him. On its face and without any background, this testimony appeared to be incredible. However, if Petitioner had been permitted to use evidence relevant to this issue, his explanation would have been credible. The excluded evidence would have cast doubt on E. B.'s testimony by dispelling any assumption that she lacked sufficient knowledge to fabricate her evidence and would have bolstered the Petitioner's credibility and enhanced the possibility that the jury would acquit him.[1] Moreover, the prosecution compounded the effect of the Missouri rape shield law in cross-examination of the Petitioner by suggesting that, in fact, his suggestion that E. B. was sexually experienced and active was incredible, and then taking refuge behind the shield to prevent Petitioner from using, *inter alia*, the state's own records to refute the

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[1] Petitioner recognizes that consent was not a defense to any of these charges; however, the circumstances of this victim's sexual proclivity would have been vital evidence to Petitioner's credibility and his testimony that these acts were never committed.

innuendo. Lastly, it is Petitioner's position that the failure to admit evidence of the prior sexual conduct of E. B. for the limited purpose of challenging her credibility and dispelling any assumption that she would have been unable to have presented such sexually explicit testimony unless it was true, violated both his right to confront and cross-examine witnesses and to call witnesses in his defense as guaranteed under the sixth and fourteenth amendment, to the United States Constitution.

This Court recently had an opportunity to review a rape shield law in the face of a challenge that it violated a defendant's sixth amendment rights. In *Olden v. Kentucky*, 488 U.S. 227 (1988), the defendant was charged with, among other things, rape. The defendant's defense was consent. His theory was that the victim had lied about the alleged rape in order to placate her boyfriend who observed her getting out of the defendant's automobile. The complainant and her boyfriend were living together, and defendant contended it was crucial to his defense to be allowed to introduce the evidence. The trial court granted the prosecution's motion in limine to keep such cohabitation evidence from the jury. The Kentucky Court of Appeals affirmed. In a per curiam decision, this Court reversed the Kentucky Court of Appeals, holding that it failed to accord the proper weight to the Petitioner's sixth amendment right to be confronted with the witnesses against him.

In the present case, the restricted cross-examination of E. B. withheld critical facts from the jury, from which they could have concluded that E. B. fabricated her story and that she made the advances to the Petitioner. In the

aggregate, the "missing" facts about E. B. paint an entirely different portrait of her than the profile of a sexually unsophisticated child deliberately portrayed by the prosecution. The "missing" facts would have shown that E. B. had no knowledge of social norms because of her frequent masturbation in front of third persons.They would have shown that she was seen acting out sexually with her brother and attempting oral sex on a five-year-old neighbor child. They would have shown that she talked about boys making her "horny." They would have shown that she had a severe emotional problem, manifesting itself in her sexual activities.

E. B. had a motive to lie. Evidence adduced at trial showed that her mother's live-in boyfriend resented the dependency and the relationship between E. B.'s mother and Petitioner. E. B. was a ten-year old, subject to suggestion by the boyfriend, with a child's propensity to fabricate and a sexually active adult's ability to construct fabricated evidence. There was ample evidence which would have been relevant on this issue, but such evidence was foreclosed from the jury. The exclusion of this evidence denied Petitioner his fundamental rights under the sixth amendment to the United States Constitution. The state has not used the Missouri rape shield law to protect a complainant, it has used it as a weapon in cross-examination and as a device to shield the jury from the truth.

The holdings from state courts which have confronted this issue and held their various rape shield statutes unconstitutional as applied may be helpful. In *Summitt v. State,* 101 Nev. 159, 697 P.2d 1374 (Nev. 1985), the Supreme Court of Nevada held that the prior sexual

experience of a six-year-old victim, where the sole and limited purpose of the testimony was to challenge the victim's credibility by dispelling any inferences which the jury might have drawn that a six-year-old would be unable to describe occurrences in her testimony unless they had actually taken place, was admissible, and its exclusion was reversible error requiring a new trial. *Summitt*, 697 P.2d at 1377. The court noted that the defendant in that case did not seek to impeach the credibility of the complaining witness by a general allegation of unchastity, but rather, offered evidence to show her knowledge of the nature of such acts rather than her lack of chastity. In reversing the defendant's conviction, the court stated that the remaining evidence of guilt was not strong, and since the accuracy and truthfulness of the complaining witness' testimony were key elements in the case against defendant, a reversal was required. *Id.*

In *State v. Howard*, 121 N.H. 53, 426 A.2d 457 (N.H. 1981), the New Hampshire Supreme Court held that in prosecution for statutory rape, the trial judge should determine whether prior sexual activity of a twelve-year-old victim should be admitted to afford defendant the opportunity to show that she had the experience and ability to contrive the charges against him. In so holding, the court stated:

> We believe that the average juror would perceive the average 12-year-old girl as a sexual innocent. Therefore, it is probable that jurors would believe that the sexual experience she describes must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it. However, if statutory rape victims have had other sexual

> experiences, it would be possible for them to provide detailed, realistic testimony concerning an incident that may never have happened. To preclude a defendant from presenting such evidence to the jury, if it is otherwise admissible, would be obvious error. Accordingly, a defendant must be afforded the opportunity to show, by specific incidences of sexual conduct, that the prosecutrix has the experience and the ability to contrive statutory rape charges against him.

Howard, 426 A.2d at 462.

In *Commonwealth v. Black*, 337 Pa.Super. 548, 487 A.2d 396 (Pa.Super. 1985), the Superior Court of Pennsylvania held insofar as the rape shield law purports to prohibit the admission of evidence which may logically demonstrate a witness' bias, interest, or prejudice, or which properly attacks the witness' credibility, it unconstitutionally violates the accused's right to confrontation under the sixth amendment to the United States Constitution. On remand, the trial court was to determine whether the defendant's proffered evidence was admissible. The defendant was the prosecutrix's father. The defendant sought to introduce evidence of the prosecutrix's prejudice by introducing evidence of her sexual relationship with her brother, which ended when the brother was forced by the defendant to leave home. The defendant contended that the true extent of the prosecutrix's bias against him could only be revealed by showing the abnormal, sexual relationship which she had with her brother and which had been terminated by defendant's dispute with her brother. Specifically, the defendant sought to show that the prosecutrix's testimony was designed to punish him for interference with her sexual relationship with her brother, and also to

remove the defendant from the home, so that her brother might return and resume the relationship. *Black*, 487 A.2d at 398.

In *State v. Pulizzano*, 155 Wis.2d 633, 456 N.W.2d 325 (Wis. 1990), the defendant was convicted of first degree sexual assault. The defendant made an offer of proof at trial on the basis of a physician's report, which suggested that the alleged victim of sexual abuse had earlier been victimized by other adults, and hence provided a basis upon which to permit cross-examination of the victim in an attempt to show that the child had acquired explicit knowledge of sexual matters from instances other than the alleged sexual abuse by the defendant. The court held that the application of the rape shield law, so as to preclude the defendant from cross-examining the child about prior sexual abuse by other adults, violated the defendant's confrontation and compulsory process rights. The court reasoned that the state's interest in protecting the child witness through enforcement of the law was outweighed by the defendant's right to show the child's ability to fabricate testimony. *See also State v. Jalo*, 27 Or. App. 845, 557 P.2d 1359 (Or. App. 1976) (*Davis* requires evidence relative to the issue of witness fabrication); *Marion v. State*, 267 Ark. 345, 590 S.W.2d 288 (Ark. 1979) (defendant has constitutional right to confront witness as to bias or fabrication); *Commonwealth v. Joyce*, 382 Mass. 222, 415 N.E.2d 181 (Mass. 1981) (while lack of chastity generally inadmissible, defendant has right to cross-examine complainant to show bias or fabrication); and *Winfield v. Commonwealth*, 225 Va. 211, 301 S.E.2d 15 (Va. 1983) (evidence probative of motive to fabricate is relevant and admissible).

In the instant case, it is also probable that jurors would believe that E. B. was an average ten-year-old girl who would not be able to describe such sexual experiences unless they had actually occurred. The obvious danger is that, without the "missing" evidence, the jury would naturally conclude that she acquired her knowledge and sexual experience from the Petitioner. (Although evidence of sexual abuse by her father was introduced into evidence, she stated that it was different than the sexual experience she had with the Petitioner.) If Petitioner had been allowed to present evidence of E. B.'s sexual experiences, this danger would not have existed.

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), this Court held that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias is subject to the harmless error analysis of *Chapman v. California*, 386 U.S. 18 (1967). Thus, a reviewing court must determine whether the error was harmless beyond a reasonable doubt. In making this determination, the relevant factors include the importance of the witness's testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradicting testimony, and the extent of cross-examination otherwise permitted.

In the present case, E. B. presented the only testimony concerning the charges against Petitioner. Two other young girls testified regarding allegations of sexual misconduct on the part of the Petitioner, but their testimony referred to events which did not occur within the same time frame. Thus, E. B.'s testimony was uncorroborated, and this case largely depended solely upon her testimony pitted against Petitioner's testimony.

E. B. had the experience and knowledge to fabricate her testimony. However, the Petitioner was prevented from effectively cross-examining her and demonstrating this knowledge.

In considering the relevant factors within the context of this case, it is impossible to conclude "beyond a reasonable doubt" that the restriction on the Petitioner's right to confrontation was harmless.

CONCLUSION

The interpretation and/or application of the Missouri rape shield law has denied the Petitioner his fundamental rights of confrontation and to produce witnesses in his own defense in violation of the sixth amendment. Moreover, the prosecution deployed the Missouri rape shield law to attack Petitioner's credibility and to preclude him from offering relevant evidence to rehabilitate his credibility. In summary, the Missouri rape shield law was used to mislead and shield the jury from the truth on matters critical to Petitioner's defense. Therefore, Petitioner respectfully suggests to this Court that the Supreme Court of the State of Missouri has decided a federal question in a way that conflicts with applicable decisions of this Court and has decided a federal question in a way that conflicts with a decision of other state courts of last resort.

WHEREFORE, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

KOENIGSDORF & WYRSCH, P.C.

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In the Supreme Court of Missouri

No. 73418
W.D. No. 42386

January Session, 1991

State of Missouri, Respondent,

vs. (TRANSFER)

Clyde H. Weiler, Appellant.

Now at this day, on consideration of appellant's application to transfer the above-entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1991, and on the 7th day of February, 1991, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 7th day of February, 1991.

/s/ Thomas Simon Clerk

_____ _____D.C.

[SEAL]

Missouri Court of Appeals

WESTERN DISTRICT

1300 OAK STREET

KANSAS CITY, MO. 64106-2970

PEGGY STEVENS MCGRAW AREA CODE 816 474-5511

CLERK-DOCKET ATTORNEY

January 2, 1991

IMPORTANT NOTICE

TO; ALL ATTORNEYS OF RECORD

RE: STATE OF MISSOURI, RESPONDENT
vs.
WEILER, CLYDE, APPELLANT

WD# 42386

Please be advised that Appellant's motion for rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.03.

PEGGY STEVENS MCGRAW
CLERK DOCKET ATTORNEY

cc: John Munson Morris
Charles Emmert Atwell

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, Respondent,	)	No. WD 42386
v.	)	
CLYDE H. WEILER, Appellant.	)	Opinion Filed: November 20, 1990

APPEAL FROM THE CIRCUIT
COURT OF JACKSON COUNTY

Honorable H. Michael Coburn, Judge

Before Kennedy, P.J., Shangler and Gaitan, JJ.

Defendant Clyde H. Weiler was convicted upon jury trial of one count of sodomy by deviate sexual intercourse, § 566.060, RSMo 1986, and two counts of first degree sexual abuse, § 566.100, RSMo 1986, with a sentence of five years' imprisonment on each count, to be served consecutively. The pathic was E. B., a female child under the age of 14 years, to wit, of the age of ten years between the dates of January 1, 1988, and May 19, 1988, when the offenses were alleged to have occurred.

The 73-year-old unmarried defendant was a friend of E.B.'s mother, and of her maternal aunt and her grandmother. He performed gratuitous services for them,

including taking E. B.'s mother to and from her employment, baby-sitting E. B. and her two younger brothers, running various errands and the like. The evidence favorable to the verdict shows that the acts performed upon and with E. B. came within the statutory definition of the crimes with which defendant was charged, and there is no claim to the contrary.

The proof supporting the sodomy count was that defendant on an occasion at E. B.'s home had granted E. B.'s request for a quarter on condition that she perform fellatio upon him. E. B. acceded to the condition, herself unzipping his pants and taking his penis into her mouth as he sat in a chair and she knelt on the floor before him.

The evidence tending to prove the two first degree sexual abuse counts, § 566.100, RSMo 1986, was that defendant had placed his hand on E. B.'s breast and on her vagina.

Defendant on this appeal claims that the court erred in unduly restricting proof of E. B.'s sexual activities and propensities. This proof (offered by way of one of the State's witnesses other than E. B., and also by way of cross-examination of E. B. herself) was excluded by the trial court on the ground of the rape shield statute, § 491.015, RSMo 1986.

The evidence excluded by the court was this: E. B. was a frequent masturbator. She often masturbated before her friend Tina, who was a witness for the State. She indicated to Tina that being around little boys made her "horny."

Defendant says that the excluded testimony would have made more credible defendant's testimony that E. B. one evening as defendant slept on the couch at E. B.'s residence unzipped his pants and was trying to get his penis into her mouth. This evidently referred to the incident described in the sodomy count, which was testified to by E. B. and also by E. B.'s friend, Tina, who was a witness to the transaction. Defendant reasons that the jury would assume that a ten-year-old child like E. B. was a sexual innocent and they would reject defendant's testimony. If they had known her sexual sophistication, says defendant, they would have found defendant's account more believable.

The rape shield statute has been interpreted to mean that evidence of prior sexual history is rigidly excluded which does not fit within one of the categories of evidence expressly permitted by the terms of subsection 1 of the rape shield statute. *State v. Jones*, 716 S.W.2d 799, 800 (Mo. banc 1986). Defendant says, however, that the exclusion of the evidence violated his Sixth Amendment guarantee of compulsory process, and his Fourteenth Amendment right to a fair trial, citing *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

We have recently held, in *State v. Douglas*, ___ S.W.2d ___ (Mo. App. 1990) [No. WD 41558, August 14, 1990], that the rape shield statute may not be applied mechanistically to exclude evidence which defendant is entitled to present, by way of cross-examination of witnesses against him or by means of witnesses called in his behalf, under his constitutional rights to confront witnesses against him and to present evidence in his own behalf. In

so holding, we rejected the State's contention that *Jones* rigidly ruled out evidence of the pathic's prior sexual history which did not fit in one of the categories expressly permitted by the rape shield statute, *if* the exclusion of such evidence deprived defendant of his constitutional right to a fair trial.

In the case before us, however, we believe the exclusion of the evidence of E. B.'s sexual practices was not prejudicial to defendant and did not deprive him of a fair trial. From the State's own evidence the jury could infer that E. B. was sexually aware, and the evidence defendant was not permitted to introduce would have added very little. Notice the following evidence which was before the jury without objection from the State's own witnesses: E. B. testified that she, in return for candy, money and toys, had been touching defendant's sexual organ (including fellatio) at his instigation since she was seven. E. B. had been the victim of "bad touching" by her father when she was "two or three" and was attending sessions at Metropolitan Organization to Counter Sexual Assault ("MOCSA"). Defendant transported her to and from the MOCSA meetings. Furthermore, E. B.'s familiarity with the male anatomy and the technique is clear from Tina's description of the act.

The evidence which was excluded would have no tendency to impeach E. B.'s credibility. E. B.'s consent to the acts with which defendant was charged was no defense and her consent was not an issue in the case. We have concluded that the exclusion under the rape shield statute of the evidence of E. B.'s sexual practices and proclivities was entirely correct.

The trial court did not err in denying defendant's motion for a psychological examination of E. B. No statute or rule authorizes such an examination, but we shall assume for present purposes the inherent power of the court to require it in a proper case. *See State v. Johnson*, 714 S.W.2d 752, 756-59 (Mo. App. 1986). There is no evidence here of defendant's "compelling need" for such an examination in order to test the credibility or competency of E. B. Defendant cites only the evidence of E. B.'s precocious sexual awareness as ground for the psychological examination, but this alone does not necessitate any compelling need for a psychological examination. The trial judge was well within his discretion in denying defendant's motion therefor.

Defendant says the information is fatally deficient "because the information was indefinite and very unclear as to dates and locations." The charge that the offenses occurred in Jackson County, Missouri, between the dates of January 1, 1988, and May 19, 1988, is sufficiently specific as to time and place. Defendant's complaint against the information often appears in appeals by defendants in cases of sex offenses against children, and arguments like defendant's have been ruled against them time after time. *See State v. Higdon*, 774 S.W.2d 498, 500 (Mo. App. 1989); *State v. Meyers*, 770 S.W.2d 312, 315-16 (Mo. App. 1989); *State v. Hoban*, 738 S.W.2d 536, 539-41 (Mo. App. 1987); *State v. Ellis*, 710 S.W.2d 378, 383-84 (Mo. App. 1986); *State v. White*, 674 S.W.2d 551, 553-54 (Mo. App. 1984); *State v. Allen*, 622 S.W.2d 275, 276 (Mo. App. 1981); *State v. Kammerich*, 550 S.W.2d 931, 932 (Mo. App. 1977). We likewise rule defendant's criticism of the information untenable.

Defendant, alternatively to his motion to dismiss the information for lack of allegations of specific dates and places, moved for a bill of particulars. The court denied such motion, a ruling asserted by defendant as error on this appeal. A motion for a bill of particulars is addressed to the trial court's discretion, and its ruling should not be disturbed unless there is an abuse of discretion. *State v. Raines*, 748 S.W.2d 865, 869 (Mo. App. 1988); *State v. Hafeli*, 715 S.W.2d 524, 527 (Mo. App. 1986); *State v. Feeler*, 634 S.W.2d 484, 486 (Mo. App. 1981); *State v. Cox*, 352 S.W.2d 665, 672 (Mo. 1961). Only in rare cases, not including the present one, are the discovery tools provided by Rule 25 inadequate to enable defendant to pinpoint the offense sufficiently to prepare a defense thereto. The trial court did not abuse its discretion in denying defendant's motion for a bill of particulars.

Defendant complains of the admission of evidence of prior uncharged sexual offenses committed by defendant with or upon E. B. The trial court did not abuse its discretion in overruling defendant's objections thereto. A line of cases holds that, in trials of sexual offenses against a young child, evidence of a defendant's prior sexual offenses of the same character, especially with or upon the same person, are admissible to show a "common scheme or plan." *See State v. Taylor*, 735 S.W.2d 412, 418 (Mo. App. 1987); *State v. V C*, 734 S.W.2d 837, 845 (Mo. App. 1987); *State v. Sandlin*, 703 S.W.2d 48, 49 (Mo. App. 1985); *State v. Smith*, 694 S.W.2d 901, 902 (Mo. App. 1985); *State v. Koster*, 684 S.W.2d 488, 490 (Mo. App. 1984); *State v. Dalton*, 587 S.W.2d 644, 645 (Mo. App. 1979). The evidence of defendant's prior uncharged sexual offenses was

admissible to show a common scheme or plan by defendant to engage in sexual activity with E. B.

Defendant says finally that the uncorroborated testimony of E. B. is insufficient to make a submissible case, because it was so contradictory and unconvincing as to leave the court clouded with doubts. He cites *State v. Kuzma*, 751 S.W.2d 54, 58 (Mo. App. 1987), which speaks of the corroboration rule, requiring that the victim's testimony be corroborated in cases where such testimony is "so contradictory or in conflict with physical facts, surrounding circumstances, and common experience as to be unconvincing." *Id.* (quoting *State v. Sipes*, 651 S.W.2d 659, 660 (Mo. App. 1983)). We do not find E. B.'s testimony either contradictory or unconvincing; it was not riddled with inconsistencies and contradictions, and, with respect to the sodomy count, was supported by the testimony of an eyewitness. The corroboration rule does not apply here, and the jury may therefore convict upon the uncorroborated testimony of the victim. *See id.; Sipes*, 651 S.W.2d at 660-62.

The judgment is affirmed.

All concur.

DON W. KENNEDY, Presiding Judge

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

STATE OF MISSOURI	)	
	)	
Plaintiff,	)	CR88-2648
vs.	)	DIVISION NINE
CLYDE H. WEILER,	)	DOCKET "D"
	)	
Defendant.	)	

JUDGMENT

(Jury Trial – No Probation)

On August 18th, 1989, came the attorney for the State, Debra Porter and the defendant appeared in person and by attorney, Charles Atwell.

It is adjudged that the defendant has been found guilty on June 28, 1989 upon his plea of not guilty and verdict of guilty of the offenses of Count IV – Sodomy, a class "B" felony; Count V – Sexual Abuse in the First Degree, a class "D" felony; and Count VI – Sexual Abuse in the First Degree, a class "D" felony; and the Court having informed the defendant of the verdict and having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court;

It is adjudged that the defendant is guilty of said offenses as found by the jury.

It is adjudged that the defendant is hereby sentenced and committed to the custody of the Missouri Division of Adult Institutions for a period of five (5) years on Count IV; five (5) years on Count V; and five (5) years on Count VI. Said sentences are to run consecutively.

It is ordered that judgment be and hereby is entered in favor of the State of Missouri and against defendant for the sum of $68.00 for the Crime Victims' Compensation Fund, and that execution issue therefore [sic].

It is ordered that the Court Administrator deliver a certified copy of this judgment and commitment to the Jackson County Department of Corrections and that the copy serve as the commitment of the defendant.

It is further ordered that defendant's bond is increased to $75,000 secured.

8-23-89
DATE

/s/ H. Michael Coburn
H. MICHAEL COBURN,
JUDGE

A TRUE COPY – ATTEST CIRCUIT COURT OF JACKSON COUNTY, MO.

COURT ADMINISTRATOR'S OFFICE
DEPARTMENT OF CIVIL RECORDS

BY /s/ Connie Gonzalez DCA

Copies mailed
this 23 day of
August, 1989 to:

Debra Porter, Prosecutor's Office
Charles Atwell, Defendant's Attorney
Jackson County Department of Corrections
Probation & Parole
CR Data Entry
CR Section

/s/ Connie Gonzalez
Connie Gonzalez, Division Clerk

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

STATE OF MISSOURI, Plaintiff,	)	Case No. CR88-2648
v.	)	Filed 1990 JUL 11
CLYDE WEILER, Defendant.	)	

MOTION OF JUDGMENT OF ACQUITTAL
AFTER DISCHARGE JURY OR, IN THE
ALTERNATIVE, MOTION FOR A NEW TRIAL

COMES NOW the defendant Clyde Weiler, by and through counsel, and pursuant to Rule 27.07(c) and 29.11(d) of the Missouri Rules of the Court, and moves this Honorable Court for judgment acquittal after discharge of jury or in the alternative, a new trial.

1. The trial Court should either grant a judgment acquittal or grant a new trial in this cause in that it erred in failing to sustain the defendant's motion pursuant to Chapter 491.015.3 to offer potential evidence of sexual conduct. In this particular case, the defendant attempted to introduce sexual conduct of the victim in this cause, one Emerald Blocker. That evidence consisted in the main, of the fact that Emerald Blocker constantly was involved in sexual activities, especially including frequent masturbation. This evidence was potentially adduceable by the victim's mother, Vera Blocker by the testimony of the defendant herein and further from the testimony of Tina Campbell. The defendant took the position that this evidence was admissible pursuant to the dictates of Chapter 491.015.2 in that it was evidence that

the Court should have found relevant to material fact or issue. In this particular cause, the defendant herein both in his trial testimony and his statement given to the police suggested that advances were made upon him by the ten year old victim in this cause. Without question, such allegations on its face appear to lack credibility. However, this excluded evidence was vital to the credibility to the defendant's case and to his testimony. The fact of the matter is that there was substantial evidence excluded that would have in fact bolstered the defendant's credibility and lend credence to the defendant's position. The defendant recognizes that consent was not a defense to any of the charges before the Court. However, the circumstances of this victim's sexual proclivity would have been key evidence to the credibility of the defendant herein, and whether or not the acts ever were committed at all. Whether or not the acts were committed at all is clearly a material issue as defined by Chapter 491.015.2. Further, this error was exacerbated by the constant innuendo and cross-examination of the prosecutor suggesting that in fact the defendant's suggestion of the sexual proclivity of this ten year old victim was beyond belief. Frequently in cross-examination, the prosecutor attempted to make points demonstrating the purported incredible nature of these allegations, when in fact, there was substantial evidence to show that what he was saying was the truth. The prosecutor's use of this technique both in the trial itself and in closing argument, is analogous to a situation in which a prosecutor comments upon the non-production of evidence that has been legally excluded by the trial Court. Such circumstances have been ruled by the courts in this state to be plain error. See

for example, *State v. Hammonds*, 651 S.W.2d 537 Mo. App. 1983; *State v. Abbott*, S.W.2d 260 Mo. App. 1983; *State v. Luleff*, 729 S.W.2d 530 Mo. App. 1937. See also generally, *Garris v. United States*, 390 F.2d 862 D.C. Cir. 1968 and *Rizzo v. United States*, 304 F.2d 810 (8th Cir. 1962). It is the defendant's contention herein that the failure to allow the admission of this evidence denied the defendant his right to a fair trial as envisioned in the Fourteenth Amendment of the United States Constitution and Article 1, Section 10 of the Missouri Constitution. Further, the exclusion of this evidence also denied the defendant his right to confront the evidence against him, consistent with his rights guaranteed to him under Article 1, Section 18(a) of the Missouri Constitution as well as his Sixth Amendment Rights incorporated with the Fourteenth Amendment of the United States Constitution. Lastly, these circumstances also denied defendant his rights to compulsory process as is indicated in Article 1, Section 18(a) of the Missouri Constitution as well as his Sixth Amendment Rights to same as incorporated by the Fourteenth Amendment of the United States Constitution. In this regard, see generally *Rock v. Arkansas*, ___ U.S. ___ 107 S.Ct. 2704 (1987). See also generally *Chambers v. Mississippi*, 410 U.S. 284 (1972) and *Crane v. Kentucky*, ___ U.S. ___ 106 S.Ct. 2142 (1986).

2. The trial Court should grant judgment of acquittal after discharge of the jury or in the alternative, a new trial based upon the Court's overruling of defendant's motion for Psychological Examination of the Victim. Said motion was filed on October 25, 1988 and subsequently, on or about April 10, 1989 and was overruled by the trial Court. In this particular case, the circumstances were so

unusual that such examination should have been granted. The victim in this cause did in fact have extreme sexual proclivities and in fact had been involved in foster care on at least three different occasions. Also, it appears from the evidence that this victim may have in fact had a motive to fabricate her testimony due to the conflict between the defendant in this cause and the victim's mother's live-in boyfriend, Kevin Waller. The failure of the trial Court to sustain this motion constituted error and violated the defendant's rights to confront the evidence against him as well as his rights to due process of law. Such action by the trial Court runs afoul of the defendant's due process rights as contained in Article 1, Section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution and is further violative of his rights guaranteed to him under the Fourteenth Amendment of the United States Constitution and Article 1, Section 18(a) of the Missouri Constitution.

3. The trial Court in this cause erred in failing to sustain defendant's Motion to Dismiss or in the alternative, for a Bill of Particulars. The information in this cause set forth dates of between January 9, 1988 and May 19, 1988 in which certain alleged acts occurred. Defendant respectfully suggests that in the circumstances of this case that such pleading failed to give the defendant proper notice of the charges against him as guaranteed to him by Ariticle [sic] 1, Section 18(a) of the Missouri Constitution as well as the Fourteenth Amendment of the United States Constitution. Further, the Court also erred in failing to obviate the situation by requiring the state to file a Bill of Particulars as alternatively requested by the

defendant. It should be noted that Rule 23.04 of the Missouri Rules of the Court requires that a Bill of Particular, without leave of the court, be filed within the first ten days of arraignment. In paragraph 7 of defendant's motion filed on or before September 21, 1988, there were exceptional circumstances stated as to why this Bill of Particulars could not be filed in such a timely fashion. It is respectfully suggested that the Court's overruling of this request should be based not upon the Court disallowing the matter to be filed but upon the Court overruling the motion on its merits. Lastly, it is respectfully stated that the Court's failure to either dismiss the indictment for failure to state an offer or for Bill of Particulars also violated the spirit of the defendant's rights as contained in Article 1, Section 16, 17, 18(a) of the Missouri Constitution as well as Article 1, Section 2 and 10 of the Missouri Constitution and the Fifth and Sixth Amendments of the United States Constitution as incorporated to the State's Fourteenth Amendment of the United States Constitution. It is further suggested that the manner in which the information of this cause was plead creates a situation where the charging body, be it a preliminary hearing judge or a grand jury, could not adequately determine what facts and circumstances gave rise to the charges that are brought before the Court and to assure whether or not the defendant is in fact being charged upon the evidence that was presented during such preliminary charging procedure.

4. The Court should grant a judgment acquittal in this cause or alternatively a new trial based upon the fact that the trial Court allowed into evidence the written statement of Clyde Weiler, while requiring that certain

matters regarding the victim's masturbation be excluded from the jury's consideration. Such was erred based upon the matters contained in paragraph 1 herein. Further, it was prejudicially unfair for the Court to allow only the partial statement to be admitted into evidence which was further exacerbated by the fact that eventually the defendant did testify briefly in regards to masturbation and such evidence was never in fact excluded from the hearing of the jury nor did the State move to strike said evidence. Again, this circumstance creates a situation where the State was able to suggest that the defendant's version of what happened in his relationship with this young victim was incredible and yet the State consciously, through the Court's ruling excluded evidence that was probative of these very contentions.

5. The Court in this cause should grant judgment acquittal after discharge of the jury, or in the alternative, for a new trial based on the fact that there is insufficient evidence to support the allegations contained in the convictions as it relates to Counts IV, V, and VI of the information. All such counts require that the act occurred within a time frame of the night of January 9, 1988, up until May 19, 1988. There is insufficient evidence presented that the acts described in those counts occurred during those dates. For these reasons, judgment of acquittal should in fact be granted. It is defendant's contention herein that a reasonable juror could not in fact have found that these acts and circumstances occurred within the suggested dates and therefore, due process requires that acquittal be ordered. See *Jackson v. Virginia*, 443 U.S. 31 (1982). Further, based upon the reasoning of *Jackson v. Virginia*, failure to grant a judgment of acquittal in this

regard would violate defendant's right of due process of law as envisioned in Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution.

6. The trial Court erred in overruling defendant's motion to suppress his statements. Because of that fact, the Court should either grant a judgment of acquittal or grant a new trial. The failure to overrule that motion violated the defendant's rights as envisioned under Article 1, Sections 10, 18(a) and 19 of the Missouri Constitution as well as his basic Fifth and Sixth Amendment Rights as incorporated to the Fourteenth Amendment of the United States Constitution.

7. The trial Court should grant a motion for judgment of acquittal after discharge of the jury or in the alternative, a new trial based upon the fact that the prosecutor was allowed to admit, over defendant's objections and certain other act evidence. In specific terms, the prosecutor was allowed to admit the testimony of one Jessica Johnson regarding certain acts that occurred in 1987, approximately on [sic] year before the acts claimed in the information. It is the defendant's contention that the probative value of such evidence was outweighed by its prejudicial effect and therefore should not have been admitted. Further, for these same reasons, it is defendant's suggestion that the admission of this evidence denied him due process of law and that judgment of acquittal or a new trial is in fact in order.

8. Defendant herein respectfully states that the errors suggested in this motion are in fact constitutional in nature and envisions his rights guaranteed to him

under the Fifth and Sixth Amendment of the United States Constitution as incorporated through the Fourteenth Amendment of the United States Constitution and further, envisions constitutional protections contained in Article 1, Sections, 2, 10, 16, 17, 18(a) and 19 of the Missouri Constitution.

WHEREFORE, based upon the foregoing, the defendant herein would pray for an order of this Honorable Court granting judgment of acquittal after discharge of the jury or in the alternative, a new trial. Further, the defendant would pray for an order of this Court entering any other relief deem [sic] just or proper under the premises.

Respectfully submitted,

KOENIGSDORF & WYRSCH, P.C.

By /s/ Charles E. Atwell
CHARLES E. ATWELL
1006 Grand Avenue
10th Floor
Kansas City, Missouri 64106
(816) 221-0080

Attorney for Defendant

I hereby certify a copy of the foregoing was delivered this 11th day of July 1989, to:

Debra Porter
Assistant Prosecuting Attorney
47M Jackson County Courthouse
415 East 12th Street
Kansas City, Missouri

/s/ Charles E. Atwell
Charles E. Atwell

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

STATE OF MISSOURI	)	
Plaintiff,	)	Case No. CR88-2648
vs.	)	
CLYDE H. WEILER,	)	(FILED JUN 24 1989)
Defendant.	)	

MOTION PURSUANT TO 491.015.3 TO OFFER POTENTIAL EVIDENCE OF SEXUAL CONDUCT

COMES NOW Defendant, by and through counsel, and hereby gives notice to the court pursuant to Section 491.015.3 of his intent to seek an order from the court allowing the admission of certain evidence regarding prior sexual conduct of the complaining witness. Further, consistent with 491.015.3, Defendant intends to make an offer of proof on the record outside the hearing of the jury and seek the admission of this evidence. Counsel would also note that the statute involved calls for an *in camera* hearing. Therefore, counsel desires to make fully his offer of proof and his reasons for making the same on the record in such *in camera* hearing.

Respectfully submitted,

KOENIGSDORF, WYRSCH & RAMSEY, P.C.

By: Charles E. Atwell
CHARLES E. ATWELL
Tenth Floor
1006 Grand Avenue
Kansas City, MO 64106
(816) 221-0080

ATTORNEY FOR DEFENDANT

COPY

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, Respondent,	)	No. WD42386
vs.	)	
CLYDE H. WEILER, Appellant.	)	

IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI SIXTEENTH JUDICIAL CIRCUIT
Honorable H. Michael Coburn, Judge

STATE OF MISSOURI, Plaintiff,	)	No. CR88-2648
vs.	)	
CLYDE H. WEILER, Defendant.	)	

SUPPLEMENTAL TRANSCRIPT ON APPEAL

Ms. Debra A. Porter
Assistant Prosecuting Attorney
Floor 7M
Jackson County Courthouse
415 East 12th Street
Kansas City, Missouri 64106
Attorney for Plaintiff

Mr. Charles E. Atwell
Attorney at Law
10th Floor
1006 Grand Avenue
Kansas City, Missouri 64106
Attorney for Defendant

[p. 2] PRETRIAL HEARING

The pretrial hearing was had on Monday, June 26th, 1989, before the Honorable H. Michael Coburn, Judge of

Division Number 9 of the Circuit Court of Jackson County, Missouri, at Kansas City.

Ms. Debra A. Porter, Assistant Prosecuting Attorney, appeared for the plaintiff.

Mr. Charles E. Atwell, Attorney at Law, appeared for the defendant, who was present in person.

The following proceedings were had:

THE COURT: All right. The Court will call for hearing Case Number CR88-2648, State of Missouri versus Clyde H. Weiler.

The first matter to come before the Court is in connection with the order signed November 4th, 1988, for a mental examination. That examination has been returned.

Ms. Prosecutor?

MS. PORTER: Your Honor, I think at this time that the State would stipulate to the report and to the findings that the defendant is competent to proceed at this time.

MR. ATWELL: As would the defendant, Your Honor. And I think the Court can take note of the fact that it was a mental report requested on behalf of the defendant [p. 3] and, in fact, we chose the examining psychologist in the case. So we would offer no evidence other than the report itself. Obviously, should the Court find him competent to proceed and that there is not a mental disease or defect, as the report indicates, we would obviously suggest that our notice to proceed under that theory has been withdrawn.

THE COURT: All right. The Court will make a finding in accordance with the findings of the mental examination report dated December 16th, 1988, and will find that the defendant is competent to proceed and was not suffering from a mental disease or defect, either now, nor was he at the time of the alleged – the acts alleged by the prosecutor.

Okay. What else?

MR. ATWELL: Judge, I tendered to the Court a motion that I've given to Ms. Porter. The title of the motion is "Motion Pursuant To 491.015.3 To Offer Potential Evidence of Sexual Conduct."

I tendered that to the Court for filing, and I would ask that the record show the following: that the Court, at the request of counsel, has acceded to a pretrial conference in this case in chambers, where we discussed certain evidentiary issues, and then further afforded us to formally move under this statute in [p. 4] regards to those matters that we have discussed and assert any record we want.

I believe the statue indicates that in 1986 – this is what's commonly called the Rape Shield Statute. I believe the statute clearly shows that in 1986 it was amended to cover other offenses besides the crime of rape, and clearly covers the offenses that are charged in this case.

That statute indicates that if the defendant seeks to in any way introduce evidence of prior sexual conduct that he must do so by filing a written motion with the Court under subpart three of that statute, and then make a

written offer of proof and make any argument, and then the Court shall rule on the motion.

Therefore, rather than the State moving in limine to prevent me, I have to move to get it in, and then the State either accedes to or resists that motion.

I would make the following record. I believe that there may be evidence adduced in this trial as to the fact that this victim attended MOCSA. "MOCSA" stands for "Metropolitan Organization to Combat Sexual Assault." I believe there is potential evidence in this trial that she attended MOCSA counseling sessions, and she did so based upon the fact of a prior molestation at the hands of her natural father.

[p. 5] I believe that I've discussed with Ms. Porter the extent that I would intend to get into that, and I believe she takes the position that the limited matter we intend to cover – that she does not object to that based upon the fact, in the main, that this victim uses those circumstances as such a critical factor in certain time frames that that area of evidence she's not objecting to and would allow that into evidence.

The other three areas which I would attempt to elicit evidence on, to which I understand she objects, are as follows: oral testimony of my client as to the frequent masturbation of this little girl; testimony from one Tina Campbell that she has witnessed and observed those circumstances and, obviously, cross-examination of the victim in that regard; and, lastly, there is material in the DFS report that could be the subject of cross-examination in which she has indicated that this little girl has made sexual advances to other children.

Especially as it relates to the masturbation, our position is this. The basic defense in this case is that Mr. Weiler knew this little girl and her family for an extended period of time, that under those circumstances Mr. Weiler was put in a position of frequently chauffeuring the little girl around, her mother around, her grandmother around, and was basically [p. 6] used by this family, and he could not, in essence, get away from them.

Further, I believe that there will be evidence that whereas he never committed any of the acts charged in the information, there were circumstances in which she basically did some very bizarre things, made advances, if you will, towards him, and that those advances did not result in a criminal act occurring, but that they do have an explanation for some of the evidence that's in the case.

That circumstance, i.e., a ten-year-old girl making sexual advances to a seventy-three year old man is, to the [sic] say the least, unusual and, in fact, the jury may have a problem believing that. However, it is our position that it did happen, and that the constant masturbation of this little girl is evidence that shows that specific conduct, and that it goes to our ability to confront the evidence against us, as guaranteed to us by both the Missouri and United States Constitutions, and further, that it is part and parcel of our right to compulsory process to present evidence in our behalf.

We believe it's embodied both in the Sixth Amendment rights of the United States Constitution, as incorporated through the Fourteenth, and also, I believe it would cover the confrontation and compulsory process [p. 7] rights as found in Article I, Section 18, and also would be

part and parcel of due process of law under Article I, Section 10.

The best example I can state would be this. If this comes out in cross-examination or, for example, it's in his statement, the very written statement they're going to introduce into evidence – he's going to say she masturbated in front of him – the jury might very well take the position in a case such as this that that's incredible, unbelievable, and hold it against this defendant. The fact of the matter is, it's true. I mean, there is substantial evidence that it's true, and that impinges upon his right to a fair trial.

Also, the analogy could be drawn of this case to an adult rape case in which consent is an issue. There is certainly strong argument that such masturbation by a woman, an adult, unless it was reasonably contemporaneous with the charged offense, would not be admissible in that case; ergo, the analogy could suggest that it shouldn't be admissible in this case. I believe the difference is that this is such a bizarre situation, it is so critical to his defense. Further, we're not dealing with an adult, we're dealing with a ten-year-old child who's subject to – all ten-year-old children, I think, are subject to suggestion and fabrication to a degree [p. 8] different than that of an adult.

For all of these reasons, in essence, we're not being able to present the evidence that we need to meet the charges against us, to confront the evidence.

Lastly, the jury is going to get an unfair impression. They're going to find out that this man has made accusations such as this and probably think that they're

incredible when the fact of the matter is that there is substantial evidence that they're not.

For all of those reasons, we believe the motion should be sustained as to these other areas I've discussed, and that's the record we would make.

MS. PORTER: Your Honor, as to point one, the MOCSA attendance, I am in agreement that for generalized purposes and as a general overview I do intend to get into that with the victim. I would argue that by opening the door I don't open the door for the defense to get into the details of the abuse by the father, but I think, as we agreed in chambers, that that should be used as a time frame and so that the defense is not prejudiced by the jury thinking that her attendance at MOCSA was brought about by anything the defendant had done. So for those limited purposes, I would agree to testimony or evidence about her MOCSA attendance.

As to the alleged sexual advances by the victim [p. 9] towards other children, there is no direct evidence of that. All of the evidence of that is hearsay from DFS reports, things told to them by neighbors or other people. If there were direct evidence, the State would still argue to keep that out based on the fact that that's totally irrelevant to the charges that are pending against this defendant in this case.

As for the oral testimony as to the masturbation by the victim, the State would argue that that's clearly covered by the Rape Shield as sexual conduct. It only serves to prejudice the jury against the victim. It's the State's argument that just because she does this act that does not

mean that this defendant did not do the acts that he is accused of doing.

Mr. Atwell told us in chambers that the defense is that he didn't do it, these acts didn't happen, and by allowing them to argue that the victim masturbates so these acts didn't happen – I'm still not quite sure as to how this is part of his defense, how this relates to any material issue. The State has no intention of going into that portion of his statement. As far as the masturbation, I do not intend to question the victim, nor Tina Campbell, one of the State's witnesses, in regard to that.

If the Court instructs the defense not to get [p. 10] into it and this defendant, on his own while he's on the stand, if he should take the stand, decides to discuss it, then he has opened the door. And I do not think it fair or relevant that a rebuttal witness or corroborating witness then be called when he's been instructed to stay away from it and he chooses to open it up. If the jury decides to believe him or disbelieve him, that's something he's chosen to do and something he can discuss with his lawyer.

Any masturbation that may or may not have occurred in front of Tina Campbell, again, is totally irrelevant. The defendant was not present when these acts occurred. There is no nexus in time or anything, so again, that would be – any testimony by Tina Campbell would be totally irrelevant, as would cross-examination of the victim in regards to masturbation.

She did admit to Mr. Atwell that she did do that act, that it did occur. At no point in any of her statements does she say that this occurred immediately prior to the sexual acts that occurred with the defendant, and even if

they had, even if they had occurred immediately previous to this, Judge, I would still argue that it's irrelevant, because he's saying that the acts didn't occur. If they didn't, I still don't see how the jury being allowed to known that she [p. 11] masturbates has anything to do with his defense.

So we would strongly, strongly object to Mr. Atwell's request that he be allowed to get into this under Section 491.015.

MR. ATWELL: Judge, the only other comment is that specifically the record should show that I believe the statute – the first subparagraph of that statute has very specific exceptions. The second subparagraph has a general relevancy exception, which is the – may I see that?

THE COURT: Uh-huh.

MR. ATWELL: 491.015.1 has specific examples of exceptions to the statute. Subsection two has a general – what I would describe as a general relevancy exception. That is the section I'm relying upon in my motion.

I would also suggest that 491.015.1(3) indicates that it's admissible, evidence of immediate surrounding circumstances of the alleged crime. It's not really immediate surrounding circumstances, but I think it is circumstances of the alleged crime. But in essence, I'm mainly relying on that second subsection.

Also, lastly, I do think that – and I'll be quite [sic] after this, but there is some law around – I think there's a case called State versus Brown, 636 S.W.2d, and [p. 12] cases from there, and they certainly don't deal with this

particular issue, but they do suggest that Rape Shield is not an absolute bar to the evidence, and that one of the ways that this statute meets constitutional muster is for the Court to use its discretion in letting in evidence that is clearly probative. And I think under these circumstances that this would be evidence that's clearly probative of a material fact or evidence that's crucial to the defense, and that if the Court exercises that flexibility the statute then does not suffer from constitutional infirmities that have been used in other states to overrule sections of that statute.

Anyway, for those reasons and what I've already stated, I would ask the Court to entertain the motion.

THE COURT: Okay. Under 491.015, subsection two, it requires the Court to find the evidence relevant to a material fact or issue. It is the Court's preliminary view that generalized statements as to masturbation by the victim would not be relevant to any of the issues in this case and, therefore, would not be admissible under this statute.

However, if there is some evidence that connects the masturbation in some way that I can see is relevant to the particular acts that the prosecution is going to discuss, particularly those that occurred between January [p. 13] 1st, 1988, and May 19th, 1988, then I would, of course, entertain that evidence.

It's difficult for the Court, before the case begins, to determine what is and is not relevant without having heard at least some of the evidence and being able to place the evidence in context. So what I propose as the solution to the problem is to sustain the prosecutor's

motion in limine, which means that the defense is not to mention any issue regarding masturbation. Neither the defense, nor the defense witnesses, is to mention anything regarding masturbation until you approach the bench and state to the Court that you now wish to get into that area, and give the prosecution an opportunity to object and me an opportunity to make a ruling in context. That's certainly the only logical way that you can handle something like that, I think.

So I'm going to keep an open mind on the issue and sustain the motion in limine, which means nobody is to mention it until they come up and talk to the Court out of the hearing of the jury about that. In addition, if I sustain the objection, you're going to want to make an offer of proof, so you can do that at that time, too. We're not ready for that yet.

So that will be the ruling preliminarily. Don't [p. 14] get into it in voir dire and don't get into it in opening statement.

MR. ATWELL: That statute creates a converse situation. I think, just so the record is clear, the Court sustaining the prosecutor's motion in limine is the equivalent of overruling my motion as it relates to those matters that we've discussed.

THE COURT: I think that's right, temporarily, but don't rely on that.

MR. ATWELL: I understand.

THE COURT: Bring it up at the appropriate time during the trial so I can see the thing in context, that's what I'm telling you.

MR. ATWELL: I understand.

THE COURT: Okay. Anything else on that?

MS. PORTER: That's it.

THE COURT: Anything else we need to take care of at this point?

Let's see. The defense has filed a motion to waive jury sentencing, and the Court agreed – we did that off the record – and the State agreed, also.

MR. ATWELL: Judge, I might –

THE COURT: Just a minute.

And the motion to suppress evidence was moot. We cleared that up on the record, right?

* * *

COPY

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, Respondent,	)	
vs.	)	No. WD42386
CLYDE H. WEILER, Appellant.	)	

IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI SIXTEENTH JUDICIAL CIRCUIT
Honorable H. Michael Coburn, Judge

STATE OF MISSOURI, Plaintiff,	)	
vs.	)	No. CR88-2648
CLYDE H. WEILER, Defendant.	)	

TRANSCRIPT ON APPEAL

Ms. Debra A. Porter
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Kansas City, Missouri 64106
Attorney for Plaintiff

Mr. Charles E. Atwell
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Kansas City, Missouri 64106
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[p. 2] TRIAL

The trial began on Tuesday, June 27th, 1989, before the Honorable H. Michael Coburn, Judge of Division Number 9 of the Circuit Court of Jackson County, Missouri, at Kansas City, and a jury, which was duly impaneled and selected.

Ms. Debra A. Porter, Assistant Prosecuting Attorney, appeared for the plaintiff.

Mr. Charles E. Atwell, Mr. Michael P. Joyce, and Mr. James R. Wyrsch, Attorneys at Law, appeared for the defendant, who was present in person.

The following proceedings were had:

(Whereupon, State's Exhibits 1 and 2, and Defendant's Exhibit 3 were marked for identification.)

THE COURT: Counsel, approach the bench.

(Whereupon, the following proceedings were had at the bench, out of the hearing of the jury:)

THE COURT: All right. You indicated you wanted to make a record?

MR. ATWELL: Before the opening statement and the case begins, I would ask, if the Court please, that the record reflect the following, that I have renewed my motion to suppress statement – and I assume the Court's ruling will remain the same – and further, that I've renewed my offer of proof regarding matters pursuant to [p. 3] motion concerning the rape shield statute. Again, I assume the Court's ruling would be the same. The purpose for making such record is to preserve it should appellate purposes be necessary, but at the same time, not

having to interrupt and object to Ms. Porter's opening statement. With the agreement of the Court, I would ask that the record reflect those matters.

THE COURT: Yes, that will be fine.

MR. ATWELL: Also, it is my understanding that in the course of the evidence in this case the State would intend to introduce what I would describe as indirect evidence, basically in two forms: one is the testimony of a witness named Jessica Johnson, in which there will be evidence of alleged sexual conduct that she witnessed sometime in 1987; and, secondarily, there will be evidence from a witness named Devin Groves which will indicate that in approximately March 1989 she was approached by this defendant and offered candy, and I believe she may say that the defendant asked her to go with him.

I would move in limine to exclude that evidence based upon the fact that it is irrelevant and immaterial, and that its probative value is outweighed by its prejudicial effect. Further, it would deny the defendant's right to a fair trial as envisioned by the

* * *

[p. 53] MR. ATWELL: That's all the questions I have.

THE WITNESS: Okay.

REDIRECT EXAMINATION

BY MS. PORTER:

Q Jessica, I just have one question. You said you were around this defendant other times, besides that one time, is that right?

A Yeah.

Q Were there usually grownups or adults around at that time, too?

A Uh-huh.

Q And the first time that you were with him alone, was that at his house when this bad stuff happened?

A Yes.

MS. PORTER: I have nothing further.

MR. ATWELL: I have nothing else, Judge.

MS. PORTER: Thank you.

THE COURT: You may step down. Thank you.

(Witness excused.)

MS. PORTER: The State calls Tina Campbell.

MR. ATWELL: Could we make a brief record?

THE COURT: Go ahead.

(Whereupon, the following proceedings were had at the bench, out of the hearing of the jury:)

MR. ATWELL: I would like the record to show [p. 54] that I'm reasserting my motion that we discussed

under Chapter 491, because this witness is one of the witnesses who's going to testify to those matters. I assume the Court's ruling is the same.

I would further request the opportunity, if the Court is inclined at the completion of this witness' examination when the jury has cleared, that I be allowed to make a further offer of proof in regards to those matters out of the hearing of the jury.

THE COURT: All right. What we'll do is, we'll take a break right after you've finished with this witness' examination and then you can make your record.

Okay?

MS. PORTER: Yes.

MR. ATWELL: Thank you, Judge.

(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

CHRISTINA CAMPBELL,

having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. PORTER:

Q Tina, you've got a very soft voice, so I'm going to ask that you speak up real loud into that microphone so I can hear you back here. Okay?

A Yeah.

[p. 65] in your hearing. You should not form or express any opinion about the case until it is finally given to you to decide.

Court will be in recess.

(Whereupon, a recess was taken.)

(Whereupon, the following proceedings were had in open court, out of the presence and hearing of the jury:)

MS. PORTER: Tina, could you go back up there?

THE WITNESS: (Complies.)

MS. PORTER: You're still to tell the truth. Okay? Mr. Atwell wants to ask you some questions. I just want you to answer them honestly. Okay?

DIRECT EXAMINATION

BY MR. ATWELL:

Q Tina, I just want to ask you a couple of things that we've talked about before and that I wanted to ask at this time kind of in private, if I could. Okay?

A (Nods head affirmatively.)

Q Did Emerald used to – besides what you saw, this thing with Clyde, did she used to play with herself a lot or masturbate?

A Yeah.

Q And did she even do it in front of you some?

A Yeah.

[p. 66] Q She did it kind of all the time, is that right – or she did that a lot, would that be fair?

A She did it a lot, yeah.

Q Okay. And do you remember, I think, when we talked – as a matter of fact, I think you told us that she did it so much she had bruises down there, is that right?

A Yeah.

Q Did she ever say things to you, also, about being around other little boys and talking about – asking you – using the word "horny," if that made you horny? Did she say those things to you?

A Yes.

Q She did, also?

A Yes.

Q Did she say or do any of these kinds of things around the time of that same night that you saw Mr. Weiler and her do these things? In other words, did she masturbate that night?

A Yeah, before he came over.

Q Before he came over?

A (Nods head affirmatively.)

Q Okay. I take it you've never seen her do it in Clyde's presence, would that be right?

A I don't understand what you mean.

Q You said the only time you saw Clyde do anything bad was

* * *

[p. 67] this one time?

A Yeah.

Q So you never saw Emerald masturbate in front of Clyde?

A No.

Q Okay. And this time, on this night when it happened, she didn't do it in front of him; she did it right before he came over?

A Yeah.

MR. ATWELL: That's all I have, Judge.

MS. PORTER: I have nothing, Your Honor.

THE COURT: All right. You may step down. Thank you. You're excused.

(Witness excused.)

(Whereupon, a recess was taken.)

(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

THE COURT: Proceed.

MR. ATWELL: May we approach?

(Whereupon, the following proceedings were had at the bench, out of the hearing of the jury:)

MR. ATWELL: The record will reflect that the Court has previously heard, out of the hearing of the jury,

an offer of proof of witness Tina Campbell. Based upon that, is the Court still overruling my motion in regards to the admission of the evidence that we [p. 68] discussed?

THE COURT: I'm sorry?

MR. ATWELL: I said, based upon the offer of proof I made, I would again renew my motion to admit the evidence that we discussed that was excluded under 491, i.e., the masturbation evidence.

THE COURT: The ruling is still the same.

MR. ATWELL: All right.

(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

MS. PORTER: Would you mark this, please?

(Whereupon, State's Exhibit Number 17 was marked for identification.)

MS. PORTER: The State calls Devin Groves.

DEVIN GROVES,

having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. PORTER:

Q Devin, I'm going to tell you the same thing I told the other girls. I want you to speak up real loud so I can hear you. Okay?

A Okay.

Q You have a good voice. Will you please tell the jury your whole name?

A Devin Louise Groves.

* * *

EXHIBIT "1"

(SEAL) MISSOURI DEPARTMENT OF
SOCIAL SERVICES
DIVISION OF FAMILY SERVICES
CHILD ABUSE/NEGLECT INVESTIGATION -
SUMMARY

I. CASE DATA

CASE NAME - Vera Blocker/Kevin Walker

INVESTIGATION WORKER/COUNTY - Chaney - C95

INCIDENT NO. - 8814505

ADDRESS - 8037 Garfield

DATE OF REPORT - 5-24-88

DIRECTIONS TO ABOVE ADDRESS - Obvious -

DATE ASSIGNED - 5-24-88

IMMEDIACY OF SITUATION (CHECK)

___ EMERGENCY EXPLAIN - per manual

✓ NON-EMERGENCY (NO IMMEDIATE DANGER)

___ EMERGENCY ACTION TAKEN (INCLUDING CONTACT WITH POLICE, HOSPITALS, ETC.)

PARENTS

MOTHER'S NAME - Vera Walker/Blocker

ADDRESS - nnid

✓ CUSTODIAL ___ NON-CUSTODIAL

DATE OF BIRTH - 4-29-60

FATHER'S NAME – Daniel Blocker
ADDRESS – 7924 Prospect
___ CUSTODIAL ✓ NON-CUSTODIAL
DATE OF BIRTH – unk

CHILDREN
CHILD'S NAME – Emerald Blocker
SUBJECT – ✓
DATE OF BIRTH – 6-17-78
CHILD'S NAME – Robbie Blocker
SUBJECT –
DATE OF BIRTH – 11-17-81
CHILD'S NAME – Keith Blocker
SUBJECT –
DATE OF BIRTH – 7-10-85

OTHER HOUSEHOLD MEMBERS/SIGNIFICANT OTHERS
NAME – Kevin Walker
DATE OF BIRTH – unk
RELATIONSHIP TO CHILD – Mom's b-friend
NAME – Juanita Yarbough
DATE OF BIRTH – unk
RELATIONSHIP TO CHILD – G-mother

* * *

Ms. Blocker, Keith and Robbie. There was also some neighbors present who have been involved with this family for some time. They expressed concern for the children and felt that this would be the most appropriate

action to be taken on them. They feel Emmerald has some severe emotional problems as she has been seen sexually acting out with her brother Robbie and with a five year old neighbor child who she was attempting to preform oral sex on. The neighbors expressed much concern over Vera's lack of concern over the children and indicated that they have observed her partying with teenagers frequently. Further she does not provide supervision for the children and Emmerald is allowed to run the streets until the child chooses to come home. They have seen Vera giving Emmerald wine while partying with other teenagers. When the police arrived to the home I requested that they go to the paternal grandmother's Ms. Blocker's home to see if Emmerald is there. They agreed to do this and did not find Emmerald but threatened Ms. Blocker to make her whereabouts known. Robbie and Keith separated from their mother and grandmother easily and were taken into protective custody on this date.

9-28-88

2:00 p.m.

Phone call from Vera. Vera indicated that Daniel Blocker brought Emmerald an hour ago to her. Apparently Ms. Blocker got ahold of him after the police had come to her home. She indicated that Emmerald is packed and ready to also be taken into protective custody. Worker drove back to the Yerboro home and took Emmerald into protective custody. Emmerald was more angry than sad in being taken into protective custody. She requested that she be allowed to live with her father. She denied that there were any further issues of sexual abuse of her by him over the past three days that she has been staying

with him. She could not give an address on her father but indicated that she was staying with him in Kansas. Worker took all three children to be placed at the Salvation Army Shelter. Emmerald and Keith were observed to have lice and worker took all three children to CMH for physical examinations.

9-30-88

Phone call from Vera. Vera called to ask about the children and where they were placed and whether they were upset. Worker indicated that there would be a detention hearing on Monday 10-3-88 at 10:00 p.m. She agreed to take off work to appear for the hearing and visit the children after this detention hearing at JCJC.

10-3-88

Detention hearing with Judge Helms presiding. Present were Vera Blocker mother, Emmerald Keith and Robbie Blocker children; Julie Morrison, guardian ad litem, Jim Herbertson Juvenile Officer and this worker. The Presiding Judge Helms detained the Blocker children in the care and custody of the Division of Family Services. Emmerald was very upset following the detention hearing and Ms. Blocker made no attempts to console the child. She asked the child what was wrong with her after worker encouraged her to interact with Emmerald. Worker had another hearing on this date and explained that Vera could visit the children downstairs in the playroom. She did visit with the children for approximately an hour and a half on this date as worker was in another court hearing. Upon leaving worker explained to the children where the children were placed and who to

contact to arrange for family visits. Worker encouraged to contact the shelter at once.

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

(2)

No. 90-1724

IN THE SUPREME COURT
OF THE UNITED STATES

CLYDE L. WEILER,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent

Petition for Writ of
Certiorari to the Missouri Court
of Appeals, Western District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, Clyde Weiler, was convicted of one count of sodomy, §566.060, RSMo 1986 and two counts of sexual abuse, §566.100, RSMo 1986, for which he was sentenced to a total of fifteen years imprisonment. Petitioner then filed a direct appeal. The facts relating to petitioner's offenses are summarized in the opinion of the Missouri Court of Appeals, Western District, affirming petitioner's conviction and sentence. **State v. Weiler**, 801 S.W.2d 417 (Mo.App., W.D. 1990).

ARGUMENT

Petitioner argues that

> "Missouri's Rape Shield Statute is facially unconstitutional as interpreted by the Missouri Supreme Court, or, alternatively, is unconstitutional as applied in this case."

(Petitioner's Pet. at 7).

The Missouri Rape Shield Statute, §491.015, RSMo 1986, states in relevant part:

> 1. In prosecutions under Chapter 566, RSMo, or prosecutions related to sexual conduct under Chapter 568, RSMo opinion and reputation evidence of the complaining witness's prior sexual conduct is inadmissible; evidence of specific instances of the complaining witness prior sexual conduct or in the absence of such instances or conduct is inadmissible, except where such specific instances are:
>
> 1) evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to the alleged crime and the evidence is reasonably con-

temporaneous with the date of the alleged crime; or

2) evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease;

3) evidence of immediate surrounding circumstances of the alleged crime; or

4) evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution.

2. Evidence of the sexual conduct of the complaining witness offered under this section is admissible to the extent that the court finds the evidence relevant to a material fact or issue.

In **State v. Jones**, 716 S.W.2d 799, 800 (Mo. banc 1986), the Missouri Supreme Court held that in order for evidence to be admissible under §491.015, the evidence must 1) fit within one of the sub-sections of §491.015.1 and 2) such evidence is only admissible to the extent that the court finds the evidence relevant to a material fact or issue under §491.015.2. The court in Jones

then concluded that the defendant was not deprived of his right to a fair trial by the exclusion of the past sexual history of the victim. Id.

Subsequent cases have construed **Jones** to mean that Rape Shield statute may not be applied mechanistically to exclude evidence which a defendant is entitled to present. **State v. Douglas**, 797 S.W.2d 532, 535 (Mo.App., W.D. 1990). Thus, **Jones** does not rigidly rule out evidence of a victim's prior sexual history which does not fit into one of the categories expressly permitted by the Rape Shield Statute if the exclusion of such evidence would deprive a defendant of his constitutional right to a fair trial. **State v. Faulk**, 725 S.W.2d 56, 62 (Mo.App., E.D. 1987) (court concluded that defendant was not deprived of his right to a fair trial by the exclusion of the past sexual history of his victim); **State v. Douglas**, supra (defendant's right to a fair trial was violated

when the mechanistic application of §491.015 excluded evidence of victim's prior history when state argued that the victim's absence of an hymen was caused by intercourse with the defendant); **State v. Weiler**, supra (exclusion of prior sexual history of the victim under the Rape Shield Statute did not deprive appellant of his right to a fair trial).

Thus, despite the protestation in petitioner's brief to the contrary, there is no split in the Missouri lower courts or the interpretation of **Jones** and the application of the Rape Shield Statute. The law is clear in Missouri that if such evidence clearly fits within one of the exceptions under §491.015 and is also relevant, it is clearly admissible at trial. **Jones**, supra. Just as clearly, even if evidence does not fit within an exception under §491.015.1, but is relevant, such evidence can be admissible if the exclusion of such evidence would result in the deprivation of appellant's right to a fair

trial. **Douglas**, supra; **Weiler**, supra.[1]

Respondent further notes that the failure of petitioner's brief to address the Western District Court's opinion. In the case at bar, petitioner claims that the trial court erred in unduly restricting proof of the child victim's sexual activities and propensities. Specifically, petitioner wished to present evidence that the seven-year-old child victim was a frequent masturbater; that she often masturbated before her friend Tina who was a witness for the state; and that she indicated to Tina that being around little boys made

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[1]Respondent notes that in both **Weiler** and **Douglas**, applications for transfer to the Missouri Supreme Court were denied by the Missouri Supreme Court.

her "horny". This proof was excluded by the trial court on the grounds of the Rape Shield Statute. Section 491.015, RSMo 1986.

Clearly such evidence does not fall within any of the sub-sections of §491.015.1. Thus, the evidence only could have been admitted if its exclusion would have violated petitioner's right to a fair trial. Jones, Douglas, supra.

The Missouri Court of Appeals, Western District, stated in its opinion that:

> In the case before us, however, we believe the exclusion of the evidence of E.B.'s [the child victim] sexual practices was not prejudicial to defendant and did not deprive him of a fair trial. From the state's own evidence the jury could infer that E.B. was sexually aware, and the evidence defendant was not permitted to introduce would have added very little. Notice the following evidence which was before the jury without objections from the state's own witnesses: E.B. testified that she,

> in return for candy, money and toys, had been touching defendant's sexual organs (including fellatio) at his instigation since she was seven. E.B. had been the victim of "bad touching" by her father when she was "two or three" and was attending sessions at Metropolitan organization to counter sexual assault ("MOCSA"). Defendant transported her to and from the MOCSA meetings. Furthermore, E.B.'s familiarity with the male anatomy and the technique is clear from Tina's description of the act.
>
> The evidence which was excluded would have no tendency to impeach E.B.'s credibility. E.B.'s consent to the acts which defendant was charged was no defense and her consent was not at issue in the case. We have concluded that the exclusion under the rape shield statute of the evidence of E.B.'s sexual practices and proclivities was entirely correct.

State v. Weiler, supra at 419.

Petitioner has made no attempt in his petition to show that the exclusion of this

evidence deprived him in any way of his right to a fair trial. Rather, petitioner relies on a misinterpretation of **Jones**, supra, an interpretation that is not followed in the State of Missouri by the lower courts, to create his strawman argument. As it is written and applied in Missouri, the Rape Shield Statute is neither facially unconstitutional nor unconstitutionally applied to this case.[2]

Petitioner also argues in his petition that the excluded evidence would have cast doubt on E.B.'s testimony by dispelling any assumption that she lacked sufficient knowledge to

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[2]Assuming arguendo that petitioner's interpretation of **Jones** is correct, it would have no bearing on this case. It is clear that the Missouri Court of Appeals, Western District, did not apply the overly mechanistic interpretation that petitioner reads as being required by **Jones**.

fabricate her evidence and would have bolstered the petitioner's credibility and enhanced the possibility that the jury would acquit him. Petitioner reasons that the jury would assume that a ten-year-old child like the victim was a sexual innocent and they would reject defendant's testimony; but if they had known of her sexual sophistication, they would have found defendant's account more believable.

Since E.B. was only ten, her consent was not an issue. Thus, respondent cannot fathom how E.B.'s sexual sophistication was relevant in this trial. Either the events in question happened or they did not and the jury, by convicting petitioner, rendered its verdict. Respondent submits that there is no reason for this Court to reweigh that valid jury determination.

The remainder of petitioner's petition contains variations of his basic theme that this evidence would have helped petitioner at trial and therefore it should have been

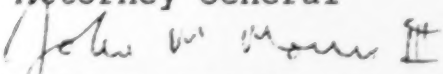
admitted. There is no argument by petitioner, however, that the exclusion of this evidence deprived petitioner of his right to a fair trial. Moreover, the Western District Court of Appeals for Missouri found that no such deprivation occurred. Thus, the evidence of the child victim's sexual proclivities was not admissible under §491.015, RSMo 1986 and that the exclusion of such evidence was proper. Therefore, respondent submits that the record presents no basis upon which this Court could find that the Missouri Court of Appeals, Western District, acted erroneously and no basis upon which review of this case by this Court is warranted.

Conclusion

In view of the foregoing, respondent submits that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that a true and correct copy of the Brief of Respondent in Opposition to Petition in the case of **State of Missouri v. Clyde Weiler**, was mailed, pursuant to Supreme Court Rule 28.5(b), postage prepaid, this 25th day of July, 1991, to:

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Supreme Court, U.S.
FILED
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No. 90-1724

In The

Supreme Court of the United States

October Term, 1991

CLYDE L. WEILER,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent argues that *State v. Jones*, 716 S.W.2d 799 (Mo. 1986) (en banc), does not rigidly rule out evidence of a victim's prior sexual history *even though it* does not fit into one of the categories expressly permitted by the rape shield statute if the exclusion of such evidence would deprive a defendant of a constitutional right to a fair trial, citing *State v. Foulk*, 725 S.W.2d 56 (Mo. Ct. App. 1987) for support. (Respondent's Brief at p. 4). However, this is in direct contradiction to both the applicable case law and to the Respondent's position in the Courts below. In *State v. Foulk*, 725 S.W.2d at 61, the Missouri Court of Appeals, Eastern District held that even if evidence of prior sexual conduct is relevant to a material fact or issue raised by the defense, it is still *not* admissible under the rape shield law unless it falls within an exception contained in the rape shield statute. Moreover, on direct appeal of this case, the Respondent argued that *State v. Jones*, 716 S.W.2d 799 (Mo. 1986) (en banc) held that relevant evidence or prior sexual conduct is not admissible unless it falls squarely within one of the four enumerated exceptions under the rape shield statute. (Appendix p. 6a). Petitioner finds it interesting that Respondent now argues there is no split in the Missouri lower courts over the interpretation of *Jones* and the application of the rape shield statute.

Respondent next argues that the strict application of the rape shield statute required by *Jones* has no bearing on the instant case because Petitioner was not subjected to strict application. (Respondent's Brief at p. 9). This simply is not the case. Petitioner has always maintained that the systematic exclusion of evidence of E.B.'s (the "Complainant's") prior sexual proclivity because it did

not fit squarely within one of the enumerated exceptions to the rape shield statute deprived Petitioner of his right to a fair trial. The Respondent attempts to divert the Court's attention from the real issue by suggesting that the issue is whether E.B. consented and arguing that E.B.'s consent is not a defense. Consent is not the issue in this case. (Respondent's Brief at p. 10).

Petitioner has always maintained his innocence and has always relied on the defense that E.B. had sufficient sexual experience to be capable of fabricating her testimony; that in fact, she did fabricate her testimony implicating Petitioner. Petitioner was foreclosed from presenting this critical defense to the jury. At the same time the Respondent knew that the rape shield statute would effectively muzzle the witness and prevent Petitioner from establishing the truth of his defense. Thus, the Respondent set out on a deliberate tactic to undermine Petitioner's defense by repeatedly suggesting that E.B. was of such tender years and limited experience that it would have been impossible for her to fabricate her testimony with its explicit sexual details. Petitioner made an offer of proof that E.B. had stated that being around boys made her horny, that E.B. masturbated frequently, sometimes in front of other people, that E.B. had been seen acting out sexually with her brother, and that E.B. had been seen attempting oral sex on a five-year-old neighbor child. Because this evidence was excluded, the jury was left with the impression that E.B. was an innocent and that her testimony against Petitioner, which was filled with sexual depictions, must be true because she did not have outside experiences that would have

provided her the knowledge needed to fabricate or fantasize such stories. If this evidence had not been excluded, the jury would have known that E.B. was a virtual encyclopedia of sexual knowledge and quite capable of constructing and fabricating her accusations against Petitioner.

Finally, the Respondent cites a portion of the Missouri Court of Appeals, Western District opinion which states:

> In the case before us, however, we believe the exclusion of the evidence of E.B.'s sexual practices was not prejudicial to the Defendant and did not deprive him of a fair trial. From the State's own evidence the jury could infer that E.B. was sexually aware, and the evidence defendant was not permitted to introduce would have added very little. Notice the following evidence which was before the jury without objection from the State's own witnesses: E.B. testified that she, in return for candy, money and toys, had been touching defendant's sexual organ (including fellatio) at his instigation since she was seven. E.B. had been the victim of "bad touching" by her father when she was "two or three" and was attending sessions at Metropolitan Organization to Counter Sexual Assault ("MOCSA"). Defendant transported her to and from the MOCSA meetings. Furthermore, E.B.'s familiarity with the male anatomy and the technique is clear from Tina's description of the act.
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> The evidence which was excluded would have no tendency to impeach E.B.'s credibility. E.B.'s consent to the acts with which Defendant was charged was no defense and her consent was not at issue in the case. We have concluded that the exclusion of the rape shield statute of the evidence of E.B.'s sexual practices and proclivities was entirely correct.

State v. Weiler (Appendix at p. 6a).

The Respondent argues and the Appellate Court hypothesizes that the admission of the excluded testimony would have "added very little" because the Respondent had introduced testimony that E.B. had been sexually abused by her father. However, at trial E.B. testified that the sexual abuse by her father was different from the sexual experience she had with the Petitioner. Thus, the jury could easily have concluded that her experience with her father would not have provided her adequate knowledge to construct and fabricate her accusations against Petitioner. Petitioner should have been permitted to present this critical evidence of the full extent of E.B.'s experiences to the jury in order to vigorously support his defense. Anything less denies him his fundamental rights under the fifth and sixth Amendments to the United States Constitution.

Petitioner asserts that the Missouri Court of Appeals, Western District, acted erroneously when it allowed the Respondent not only to use the Missouri rape shield law to protect the Complainant, but also to use it as a weapon in cross-examination and as a device to shield the truth from the jury. The exclusion of evidence of the Complainant's sexual experiences prevented Petitioner from exposing E.B.'s ability to fabricate testimony and denied Petitioner his fundamental rights under the fifth and sixth Amendments to the United States Constitution.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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